No. 93-817

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE BOEING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA
ex rel. KEVIN G. KELLY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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143PP

QUESTION PRESENTED

Does the Constitution permit Congress to authorize private citizens who have suffered no injury to litigate civil fraud claims on behalf of the United States?

PARTIES TO THE ACTION

Plaintiff

Kevin G. Kelly

Defendant

The Boeing Company

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.1, Petitioner The Boeing Company discloses that it is a corporation incorporated in the State of Delaware. Petitioner has no parent company or subsidiaries (except wholly-owned subsidiaries).

STATEMENT REGARDING THE UNITED STATES

Pursuant to Supreme Court Rule 29.4(b), Petitioner states that 28 U.S.C. § 2403(a) may be applicable. It does not appear that the courts below made a certification pursuant to § 2403(a), but the district court noted that the Attorney General was to be served with copies of all pleadings pursuant to 31 U.S.C. § 3730(c)(3). Pet. App. 77a.

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Frank A. Edgar, Jr., Comment, *"Missing the Analytical Boat": The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 Idaho L. Rev. 319 (1990) 4

Robert W. Fischer, Jr., *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 UCLA L. Rev. 778 (1973) 6

James B. Helmer & Robert C. Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, The 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 Ohio N. L. Rev. 35 (1991) 25

David C. Hsia, *Application of Qui Tam to the Quality of Health Care*, 14 J. Legal Med. 301 (1993) 26

Harold J. Kent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 276 (1989) 7, 8

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John R. Phillips, *Qui Tam Litigation: A New Forum for Prosecuting False Claims Against the Government*, 14 J. Legal Med. 267 (1993)	25, 26
Dan D. Pitzer, *The Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 Texas Int'l L.J. 415 (1972)	6
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John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993)	10
Ron Simon, "Fraud in Government Contracting," *in The Lawyer's Brief* (Dec. 31, 1990)	26
Peter H. Stone, *A Golden Whistle Beckons Law Firms*, Nat'l J. (Sept. 25, 1993)	27
Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992)	10, 13
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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, dated November 5, 1993, is not yet reported, but is reproduced at pages 1a-34a of the appendix to this petition ("Pet. App."). The circuit court's original opinion, which was filed on September 7, 1993, is reproduced at Pet. App. 35a-73a. The unreported opinion and order of the United States District Court for the Western District of Washington, dated June 3, 1992, is reproduced at Pet. App. 74a-83a. The district court's Order Certifying Interlocutory Appeal, dated June 22, 1992, which also is not reported, is reproduced at Pet. App. 84a-87a. The unreported order of the court of appeals granting permission for interlocutory appeal is reproduced at Pet. App. 88a.

JURISDICTION

The original opinion of the United States Court of Appeals for the Ninth Circuit was issued on September 7, 1993, and the amended opinion was issued on November 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution: Article II, including its Vesting Clause, the Appointments Clause, and the Take Care Clause; Article III, including its Vesting Clause and the Case and Controversy Clause; and the Due Process Clause of the Fifth Amendment. These provisions are reproduced at Pet. App. 89a-90a. The case also involves the principle of separation of powers, which is reflected throughout the Constitution.

The statute involved in this case is the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, relevant portions of which are reproduced at Pet. App. 90a-99a.

STATEMENT OF THE CASE

A. The Statutory Scheme

The False Claims Act prohibits a variety of fraudulent practices in dealings with the federal government, and provides for a civil penalty of $5,000 to $10,000 for each false claim, plus treble damages. 31 U.S.C. § 3729(a). The statute authorizes civil enforcement actions by the Attorney General. *Id.* § 3729(a). The statute also authorizes private individuals, who are sometimes known as relators, to "bring a civil action for a violation of [the Act] for the person and for the United States Government." *Id.* § 3730(b)(1).

The Act specifies certain procedures with respect to *qui tam* suits brought by private persons. The relator's complaint must be filed *in camera,* where it remains under seal for at least 60 days. During that time the Government must determine whether to enter the action. *Id.* § 3730(b)(2). If the Government decides not to intervene, the lawsuit nevertheless proceeds with the relator conducting the litigation. *Id.* § 3730(b)(4).

If the Government takes over a *qui tam* action under this statute, it has primary responsibility for the prosecution. *Id.* § 3730(c)(1). Even after such intervention, the relator continues to be a party to the action, and his participation may be limited only by order of the court. *Id.* §§ 3730(c)(2)(C)-(D), 3730 (c)(4). As an intervenor, the Government may dismiss or settle the litigation over the objections of the relator, but only with court approval. *Id.* §§ 3730(c)(2)(A)-(B).

Whether or not the Government joins the litigation, the relator is entitled to a portion of the proceeds if the prosecution is successful. In cases where the Government participates, the relator receives no less than 15 percent and no more than 25 percent of any award or settlement. *Id.* § 3730(d)(1). When the Government does not join, the relator's minimum share is 25 percent and may be as much as 30 percent, plus attorney's fees and expenses. *Id.* § 3730(d)(2).

B. The Proceedings Below

Kevin G. Kelly, a former Boeing employee, filed the original complaint in this action under seal in the United States District Court for the Western District of Washington on November 30, 1989. The complaint alleged various violations of the False Claims Act involving Boeing's lease of facilities used in connection with its work on two government contracts—the B-2 Bomber and the Advanced Tactical Fighter. Pet. App. 2a.

The Government conducted an extensive investigation of the allegations against Boeing, which lasted for 40 months and included the review of more than 400,000 pages of documents. On July 31, 1991, after completing its investigation, the Government filed notice of its election not to intervene in Kelly's action. Pet. App. 2a.

The district court thereupon unsealed the case, and Kelly filed a First Amended Complaint. Boeing moved to dismiss that complaint on the basis of the constitutional question presented in this petition. The district court denied Boeing's motion and subsequently amended its order pursuant to Fed. R. App. P. 5(a) to permit Boeing to seek an interlocutory appeal of the constitutional question. Pet. App. 3a, 84a-87a.

On August 26, 1992, the court of appeals granted permission to appeal and thus acquired jurisdiction pursuant to 28 U.S.C. § 1292(b). Pet. App. 88a. After briefing and argument, the court on September 7, 1993, rejected Boeing's constitutional arguments and affirmed the district court's order. Pet. App. 35a-73a. On November 5, 1993, the court issued an amended opinion which eliminated part of the court's rationale for upholding the standing of the *qui tam* relator but which was otherwise identical to the original opinion. Pet. App. 1a-34a.[1]

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[1] This case was argued and submitted to the court of appeals at the same time as *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827 (9th Cir. 1993). In that case, General Dynamics

REASONS FOR GRANTING THE WRIT

Until recently, *qui tam* litigation was viewed as a rare anachronism. Since the adoption of the False Claims Act Amendments of 1986, however, such litigation has mushroomed and prompted a wide-ranging constitutional debate. Former Attorney General William P. Barr, while serving as Assistant Attorney General for the Office of Legal Counsel, authored a lengthy opinion concluding that the *qui tam* provisions of the False Claims Act are unconstitutional.[2] Scholarly comment on these issues has been extensive and divided.[3]

The debate over the constitutionality of *qui tam* statutes urgently requires resolution by this Court. Over 600 *qui tam* cases, many of them wasteful and unmeritorious, have been filed since the 1986 Amendments, imposing an escalating burden on the lower courts, the Government, and parties such as Boeing. An emerging *qui tam* plaintiff's bar has pressed such suits in industries as diverse as health care, nuclear power and scientific research, and Congress is considering measures to expand its use even further. The attempt by federal courts to articulate a constitutional basis for *qui tam* litigation has led to con-

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also challenged the constitutionality of the *qui tam* provisions of the False Claims Act, although it did not raise an argument based on the Due Process Clause. The court of appeals rejected General Dynamics' constitutional arguments without discussion, referring to its opinion in the instant case. *Id.* at 829. We understand that General Dynamics is filing a petition for certiorari.

[2] *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Opp. Off. Legal Counsel 249 (1989).

[3] *See, e.g.*, Frank A. Edgar, Jr., Comment, *"Missing the Analytical Boat": The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 Idaho L. Rev. 319 (1990); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341 (1989); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. Chi. L. Rev. 543 (1990); Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which is the Real Party to the Action?*, 43 Stan. L. Rev. 1061 (1991).

fusion of settled constitutional principles, particularly in the area of standing.

At least ten district courts and two courts of appeals have issued opinions sustaining the constitutionality of this statute, but their opinions have disagreed on a number of the specific issues if not on the result.[4] This Court has never ruled on these issues, although it has noted the potentially anomalous position of the *qui tam* lawsuit in the course of deciding a variety of constitutional questions.[5]

This is the first petition for certiorari to raise these issues.[6] This is a substantial constitutional question that has not been, but should be, decided by this Court.

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[4] *United States ex rel. Kreindler & Kreindler v. United Technologies Corporation*, 777 F. Supp. 195 (N.D.N.Y. 1991), *aff'd*, 985 F.2d 1148 (2nd Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Robinson v. Northrop Corporation*, 824 F. Supp. 830 (N.D. Ill. 1993); *United States ex rel. Burch v. Piqua Engineering, Inc.*, 803 F. Supp. 115 (S.D. Oh. 1992); *United States ex rel. Kelly v. The Boeing Company*, No. C. 89-1732R (W.D. Wash. June 3, 1992), *aff'd*, No. 92-36660 (9th Cir. Sept. 7, 1993); *United States ex rel. Givler v. Smith*, 775 F. Supp. 172 (E.D. Pa. 1991); *United States ex rel. Madden v. General Dynamics Corp.*, No. CV 88-5352 WMB (C.D. Cal. Nov. 27, 1991), *aff'd*, 4 F.3d 827 (9th Cir. 1993); *United States ex rel. Truong v. Northrop Corporation*, 728 F. Supp. 615 (C.D. Cal. 1989); *United States ex rel. Newsham v. Lockheed Missiles and Space Co.*, 722 F. Supp. 607 (N.D. Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters*, 714 F. Supp. 1084 (C.D. Cal. 1989); *Hyatt v. Northrop Corp.*, No. CV 87-6892 KN (C.D. Cal. Dec. 27, 1989). *See also United States ex rel. Yellowtail v. Little Horn State Bank*, 828 F. Supp. 780, 785-86 (D. Mont. 1992) (affirming standing of relator under 25 U.S.C. § 81).

[5] *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2143 (1992); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.21 (1989); *United States v. Halper*, 490 U.S. 435, 451 (1989).

[6] The petition in *Kreindler*, *supra* note 4, was filed by the plaintiff and did not raise any constitutional issue.

I. THERE IS A SUBSTANTIAL QUESTION ON THE CONSTITUTIONALITY OF THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT.

A. The History of *Qui Tam* Litigation Does Not Resolve the Constitutional Question.

The historical record does not validate the constitutionality of *qui tam* litigation by private plaintiffs who have suffered no injury. Such *qui tam* litigation has always been a sort of legal curiosity and was never imbedded into the structure of federal law. Thus the factors that have caused this Court to give decisive weight to historical practice in some constitutional cases do not apply. *Cf. Marsh v. Chambers*, 463 U.S. 783 (1983).[7]

1. *The English Experience*

In the thirteenth century, the jurisdiction of the royal courts of England was largely restricted to matters involving the king. Private parties desiring access to the royal courts would occasionally plead that they were seeking redress, not only for their own grievances, but also for an injury to the king's interests. This pleading phrase, "*qui tam pro domino rege quam pro se ipso*," gave rise to what is now generally referred to as the *qui tam* lawsuit.[8]

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[7] The court below and most of the other courts to consider this question have agreed that the historical record is not sufficient to sustain the constitutionality of *qui tam* litigation. Pet. App. 34a n.23; *Burch*, 803 F. Supp. at 117. *See also Truong*, 728 F. Supp. at 618 (noting "tenuousness" of historical argument for qui tam's constitutionality); *Yellowtail*, 828 F. Supp. at 785-86 (affirming standing of *qui tam* relator suing under provisions of 25 U.S.C. § 81 and noting that "*Truong* correctly declined to find too much in the *qui tam* historical argument"). *But see Newsham*, 722 F. Supp. at 615 (noting "heavy reliance on *qui tam* actions by the First Congress").

[8] The discussion in this section of the petition draws largely upon Note, *The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81 (1972). *See also* Dan D. Pitzer, *The Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 Texas Int'l L.J. 415 (1972); Robert W. Fischer, Jr., *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 UCLA L. Rev. 778 (1973).

Common law *qui tam* litigation died out after the jurisdiction of the royal courts was expanded in the fourteenth century, but it was succeeded by a number of statutes that authorized private parties to bring suit on behalf of themselves and the Crown. These statutory *qui tam* actions permitted victims and informers to sue for violation of the statute and recover a share of the penalty.[9]

It should be recognized that statutory *qui tam* litigation in England was often, and perhaps primarily, criminal. This was scarcely odd, since most criminal prosecutions prior to the nineteenth century were private in nature, generally brought by the victim.[10] During this period, the government did not have a large force of police or prosecutors. It was necessary to rely upon the private initiative of victims and informers to obtain enforcement of the laws.

The growth of *qui tam* litigation in England following the fifteenth century engendered a certain amount of controversy. Informers engaged in a variety of abusive practices, including the initiation of collusive lawsuits to preclude later prosecution and the bringing of frivolous actions for purposes of harassment. Lord Coke referred to common informers as "venomous vipers."[11] A number of legislative and judicial measures were taken to reduce the amount of *qui tam* litigation and control the conduct of informers. *Qui tam* litigation gradually declined during the eighteenth and nineteenth centuries and was formally abolished by Parliament in 1951.[12]

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[9] *See, e.g.*, Statute Prohibiting the Sale of Wares after Close of Fair, 5 Edw. 3, c. 5 & 6 (1331). Some *qui tam* statutes authorized suits only by injured parties. *See, e.g.*, A Remedy For Him Who Is Wrongfully Pursued in Admiralty Court, 2 Hen. 4, c. 11 (1400) (authorizing a party improperly sued in admiralty court to recover double damages plus a fine, payable to the king, of ten pounds).

[10] *See* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 276, 290-91 (1989).

[11] 4 Sir William S. Holdsworth, *A History of English Law* 356 (2d Ed. 1937).

[12] Common Informer's Act, 14 & 15 Geo. 6, c. 39 (1951).

2. *The American Experience*

The American colonies inherited *qui tam* litigation along with other English legal practices of the seventeenth century, including the private prosecution of crimes. These practices were carried over by the newly-independent states.[13] However, the *qui tam* device never played a substantial role in American legal practice and its use rapidly disappeared after the early nineteenth century. Most states soon came to regard the prosecution of crimes and the redress of public injuries to be exclusively the responsibility of government prosecutors and attorneys.

At the Federal level, some *qui tam* statutes were passed by early Congresses. These statutes appear to have been unthinkingly carried over from English and Colonial experience, without any consideration of whether such litigation was consistent with the newly-adopted Constitution. One of the principal features of the Constitution, the tripartite separation of powers, was a marked departure from the governmental structure of England and the Colonies.

It is also unclear how often these new *qui tam* statutes were used or could be used by private informers who had suffered no injury. For example, the first copyright act has been cited as a *qui tam* statute, but it provided for the statutory penalty to be divided between the government and the author of the copyrighted material.[14] Other supposed *qui tam* statutes enacted by the First Congress provided rewards for informers without authorizing them to bring suit.[15] In some situations, it appears that *qui tam* statutes were used primarily to compensate government

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[13] *See* Krent, *supra* note 10, at 291-93.

[14] Act of May 31, 1790, ch. 15 § 2, 1 Stat. 124, *cited in Stillwell*, 714 F. Supp. at 1086 n.2.

[15] *E.g.*, Act of Sept. 2, 1789, ch. XII, § 8, 1 Stat. 65, 67 (penalties imposed on Treasury officials for violating provisions of the Act to be shared with informers); Act of March 3, 1791, ch. VIII, § 1, 1 Stat. 215 (extending same). *See Truong*, 728 F. Supp. at 617 n.3; *Stillwell*, 714 F. Supp. at 1086 n.2.

officials who at that time were often not full-time salaried employees.[16]

In any event, whatever use was made of the *qui tam* device in the early years of the Republic, it quickly fell into desuetude. Apart from the False Claims Act of 1863, which was passed at a time of national emergency, federal *qui tam* statutes have been rarely-used oddities for nearly 200 years.[17]

B. This Court Has Never Decided Whether the *Qui Tam* Device is Constitutional.

This Court has decided only a handful of *qui tam* cases, none of which presented the question of whether it is constitutional for a private citizen who has suffered no injury to litigate on behalf of the United States.[18] In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), this Court interpreted the *qui tam* provisions of the False Claims Act to permit suits by relators based on

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[16] A survey of 70 informer suits brought on the eve of the Revolution showed that 67 were brought by government officials and only one by a private informer who had suffered no injury. L. Harper, *The English Navigation Laws* 170 (1939).

[17] In addition to the False Claim Act, it appears that only four other federal *qui tam* statutes currently are in force: 18 U.S.C. § 962 (forfeitures of vessels privately armed against friendly nations); 25 U.S.C. §§ 81 & 201 (recovery of penalties for violation of Indian protection laws); 35 U.S.C. § 292 (penalties for patent infringement); and 46 U.S.C. § 723 (forfeiture of vessels taking undersea treasure from the Florida coast to foreign nations).

It should be noted that, notwithstanding similarities in the captioning of the cases, *qui tam* actions do not include all actions brought by private parties in the name of the United States, such as the Miller Act. *See* 40 U.S.C. § 270b(b).

[18] Indeed, a number of these cases, including *McCulloch v. Maryland*, were brought under state statutes and thus did not involve the same separation of powers concerns as presented by a federal statute. In *McCulloch*, the plaintiff was also a government official and not a private citizen. 17 U.S. (4 Wheat.) 316 (1819). In another leading case, the plaintiff was a victim and not a disinterested informer. *Marvin v. Trout*, 199 U.S. 212 (1905) (suit under state *qui tam* statute to recover husband's gambling losses).

information in the possession of the Government. This decision was based on the plain language of the statute. No constitutional issue was raised or decided by the Court. In the fifty years since *Marcus,* this Court has not decided any *qui tam* cases.

C. There Are Substantial Reasons to Believe That the *Qui Tam* Provisions of the False Claims Act Are Unconstitutional to the Extent They Confer Standing on Parties Who Have Not Been Injured.

1. *Standing*

The attempt to manufacture a constitutional basis for *qui tam* litigation has required federal courts to distort the carefully-crafted standing jurisprudence laid out in this Court's opinions. A score of decisions over the past two decades have clearly outlined the minimum constitutional requirements for Article III standing: (i) individual and particularized injury-in-fact to the plaintiff, (ii) which was caused by the conduct challenged in the lawsuit, and (iii) which will be redressed if the plaintiff prevails.[19]

Qui tam suits by uninjured relators represent an exception that swallows these basic standing principles. Indeed, the Court's standing doctrine has been widely criticized by academicians, many of whom argue that it is inconsistent with *qui tam* litigation which they presume to be constitutional.[20] This Court itself has indicated, without explanation, that *qui tam* relators may not be

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[19] *See, e.g., Warth v. Seldin,* 422 U.S. 490 (1975); *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464 (1982); *Allen v. Wright,* 468 U.S. 737 (1984); *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130 (1992). *See generally* John G. Roberts, Jr., *Article III Limits on Statutory Standing,* 42 Duke L.J. 1219 (1993).

[20] *See, e.g.,* Raoul Berger, *Standing to Sue in Public Actions,* 78 Yale L.J. 816, 839-40 (1969); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation,* 42 Duke L.J. 1141, 1165 (1993); Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III,* 91 Mich. L. Rev. 163, 174-77 (1992).

treated in the same manner as other plaintiffs for purposes of standing.[21]

In light of the conflict between *qui tam* litigation and this Court's standing jurisprudence, federal courts have struggled to explain how the two may co-exist. The result has been disagreement among those courts as to the constitutional basis for *qui tam* standing, and even flat rejection of principles previously established by this Court.[22] The Court should take this case to explain the place of *qui tam* litigation in the constitutional scheme and prevent further confusion and erosion of settled standing doctrine.

There are essentially three theories that have been adopted by courts and commentators in support of *qui tam* relator standing.

a. *Workplace Injury.* *Qui tam* relators are often present or former employees of government contractors who claim to have "blown the whistle" on the submission of false claims by their employers. In the present case, the plaintiff claims to have been wrongfully discharged by Boeing in retaliation for his whistleblowing. First Amended Compl. ¶¶ 7, 50-57. Some courts have held that relators suffer injury because they face a "Hobson's choice" between suffering retaliation for blowing the whistle or going along with dishonest conduct by their employer.[23] Other courts have speculated that relators suffer injury because of the embarrassment and shame of working for a dishonest employer.[24]

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[21] *Lujan*, 112 S. Ct. at 2143.

[22] For instance, the Second Circuit held that the requirement of particularized injury to the plaintiff is merely a prudential limitation on standing that Congress may override, even though this Court in *Lujan* had described particularized injury as part of the "irreducible constitutional minimum of standing." *Compare Kreindler*, 985 F.2d at 1153-54, *with Lujan*, 112 S. Ct. at 2136 & n.1.

[23] *Robinson*, 824 F. Supp. at 835; *Stillwell*, 714 F. Supp. at 1099.

[24] *Robinson*, 824 F. Supp. at 835. This argument was initially accepted by the court below, Pet. App. 42a-45a, and then deleted from its opinion.

The problem with this theory and its variants is that it does not justify standing for a cause of action based upon the submission of false claims to the Government. The false claims themselves cause injury only to the Government.

Retaliation against a whistleblower is a separate wrong, which is prohibited by another provision of the False Claims Act. 31 U.S.C. § 3730(h). This provision provides a private right of action for employees who believe they have been victims of retaliation. Such a claim was asserted in this case as a separate count from the *qui tam* claim, First Amended Compl. ¶¶ 50-52, and no one has suggested there is any constitutional defect in the retaliation claim.

b. *Legislated Standing.* Although this was not the basis for the decision below, some courts and commentators have held that Congress can legislate standing for a *qui tam* plaintiff by creating a statutory bounty.[25] This theory is superficially attractive because it seems plausible that the prospect of a bounty will provide a strong incentive for *qui tam* plaintiffs to pursue their cases vigorously, which is one of the policy objectives served by the standing doctrine.

However, this Court has made it clear in other contexts that a willingness to pursue litigation vigorously is not sufficient to establish standing. *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 225-26 (1974). Further, the prospect of a financial recovery in the form of attorneys fees is also not sufficient, since such an award is simply a "byproduct" of the lawsuit. *Diamond v. Charles,* 476 U.S. 54, 69-71 (1986).

The legislative bounty theory of standing should be distinguished from the situation where Congress adopts

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[25] Actually, some of the lower courts appeared to go even further, suggesting that Congress could confer standing whenever it wishes to do so, without regard to the case-or-controversy requirement of Article III. *See, e.g., Truong,* 728 F. Supp. at 620; *Newsham,* 722 F. Supp. at 614. Such holdings are obviously incorrect.

legislation that creates legal interests, the invasion of which can constitute injury in fact for purposes of conferring standing. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *Lujan*, 112 S. Ct. at 2146-47 (Kennedy, J., concurring).

Finally, to recognize a bounty as sufficient to confer standing would undermine this Court's established doctrines and provide a convenient loophole. By providing a bounty, perhaps even a nominal sum, Congress could confer standing on any or all citizens to pursue litigation on any issue, thus requiring the courts to resolve all sorts of political or ideological cases.[26]

c. *Derivative Standing.* Some courts and commentators, including the court of appeals below, have held that the *qui tam* plaintiff need not show personal standing because he is suing on behalf of the United States.[27] No one doubts that the United States has standing to sue for violations of the False Claims Act. Indeed, in a *qui tam* case where the United States takes over the prosecution, the standing and other separation of powers issues are largely mooted.

When the Government declines to take over the prosecution, however, there is no basis for permitting the relator to proceed without demonstrating his own standing. This situation is not analogous to one where the Government hires private counsel to represent it in litigation.[28] Here the relator is himself the party, not simply an attorney for the Government.

Moreover, in this case there is no evidence that the Justice Department intended to effectuate an assignment

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[26] *See* Sunstein, *supra* note 20 at 232 (advocating use of cash bounties to create standing in response to *Lujan*).

[27] *See* Pet. App. 8a; *Kriendler*, 985 F.2d at 1153-54; *Givler*, 775 F. Supp. at 180-81; *Truong*, 728 F. Supp. at 618-20; *Stillwell*, 714 F. Supp. at 1098.

[28] *See, e.g.*, Fair Debt Collection Practices Act, 31 U.S.C. § 3718 (authorizing Attorney General to retain private counsel, subject to government control, in debt collection cases).

of the Government's claim to the relator. Under the statute, the Government is not required to state a reason for declining to take over a *qui tam* case. It seems most likely, however, that the Justice Department simply concluded that the case was without merit.[29]

Nor is there any evidence that Congress intended the False Claims Act to effectuate a contingent partial assignment of the Government's claim to whomever might file suit as a relator. As with the "bounty" theory of standing, permitting such an assignment would also provide a loophole allowing Congress to create standing without regard to the limitations imposed by Article III.

In any event, the theory of derivative standing makes it clear that the *qui tam* relator is performing a delegated governmental function and not a private one. Even if this could be sufficient to confer standing, it would only exacerbate the infirmity of the *qui tam* plaintiff under the Appointments Clause.

2. *Appointments Clause*

This case presents the issue of whether a person can exercise civil law enforcement authority without satisfying the Appointments Clause of Article II. The clause provides that officers of the United States must be appointed by the President with the advice and consent of the Senate. Inferior officers may also be appointed by the President alone, by the heads of departments, or by the courts of law. U.S. Const. art. II, § 2, cl. 2.

Persons exercising "significant authority pursuant to the laws of the United States" are "officers" and must be appointed in one of the ways prescribed in the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). As this Court recently stated, the Appointments Clause serves an important function of assuring governmental accountability.

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[29] *See Hearing before the Subcommittee on Civil and Constitutional Rights, Judiciary Committee, U.S. House of Representatives*, 102d Cong., 2d Sess. 19-20 (Apr. 1, 1992) (statement of Assistant Attorney General Stuart M. Gerson).

> The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. . . . The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power.

Freytag v. Commissioner, 111 S. Ct. 2631, 2642 (1991).[30] Use of the Appointments Clause is not confined to a few high-ranking positions but extends, for example, to every officer in the Armed Forces and every Assistant United States Attorney. *See* 10 U.S.C. § 531 (appointment of officers in armed services); 28 U.S.C. § 542 (Assistant U.S. Attorneys).

It is conceded that *qui tam* relators are not appointed in the manner provided in the Appointments Clause. Yet Congress has delegated to them the power to pursue litigation on behalf of the United States. The Court in *Buckley* specifically held that such power may only be exercised by an officer of the United States.

> We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.

424 U.S. at 140. More recently, this Court relied on *Buckley* in finding it "clear" that an independent counsel under the Ethics in Government Act is an officer of the United States. *Morrison v. Olson,* 487 U.S. 654, 671 n.12 (1988).

The court below stated that where, as here, the Government does not intervene to take over a *qui tam* prosecution, "a relator retains primary responsibility for the litigation, thus presenting what may seem to be a close

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[30] *See also id.* at 2653 (Scalia, J., concurring in part and concurring in the judgment) (Appointments Clause assures accountability by reinforcing Executive authority).

question under *Buckley*. . . ." Pet. App. 30a. However, the court found no constitutional violation because the relator's power extends to a single case and can be limited by the court. *Id.* Of course, these factors may distinguish *Buckley* but they cannot be reconciled with *Morrison*, since an independent counsel also has power limited to a single matter and is subject to the control of the courts. *See Morrison*, 487 U.S. at 672 (these factors justify treating independent counsel as "inferior" officer).

The court below and other lower courts have also suggested a variety of other factors that would make the Appointments Clause inapplicable to *qui tam* relators, relying on cases that hold the clause inapplicable to certain kinds of employees and agents.[31] Among the factors cited are absence of a fixed term of office, part-time status, and lack of a salary. These factors cannot be dispositive, since most would also apply to the independent counsel held to be an officer in *Morrison*. Indeed, in the early days of the Republic, many officers (including the Attorney General) worked only part-time for the Government.[32] Some of these officers were compensated, at least in part, by the receipt of bounties.[33]

It should be noted that this Appointments Clause issue is presented because *qui tam* relators are suing on behalf of the Government and not to vindicate their own interests. The same concerns are not raised where Congress creates private rights of action for citizens who have been injured by conduct in violation of a statute, or even where

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[31] *See Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (holding that an appraiser hired to assist a government official is an "executive agent" not subject to the Appointments Clause); *United States v. Germaine*, 99 U.S. 508 (1878).

[32] *See* Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 66 n.1 (1953) ("For the first half century or more, the Attorney General was only a part-time legal advisor, with no professional and little or no clerical help.").

[33] *See* Gerson Statement, *supra* note 29, at 9 (noting early historical practice of compensating United States prosecutors from fees obtained in cases).

a victim is given the right of criminal prosecution. As this Court observed in *Buckley*, it is the power to bring suit to vindicate "public rights" that requires compliance with the Appointments Clause. 424 U.S. at 140.

3. *Separation of Powers*

This case also presents the issue of whether the President's authority to control litigation can be shifted to a private litigant consistent with the provisions of Article II that vest in the President "the Executive Power" and the responsibility to "take care" that the laws are faithfully executed.

Congress has been permitted to place some limits on Presidential authority where there is a good reason for doing so and where the President's essential role in the constitutional scheme is adequately preserved. *Morrison v. Olson*, 487 U.S. 654 (1988); *United States v. Nixon*, 418 U.S. 683 (1974); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

Applying the Court's separation of powers balancing test to the *qui tam* statute shows that it is unconstitutional. This is because Congress can demonstrate no good reason for diminishing Presidential authority.

In the *Morrison* and *Nixon* cases, the Court found that the inherent conflict of interest in situations of alleged wrongdoing by the President or high-level executive appointees justified the intrusion on presidential authority and independence. *Morrison*, 487 U.S. at 677, 695-96; *Nixon*, 418 U.S. at 706-07. Here, however, there is no conflict of interest.

In *Humphrey's Executor*, the Court indicated that a certain degree of independence from the President was justified for an agency with quasi-judicial and quasi-legislative powers. 295 U.S. at 629. Here, however, the *qui tam* relator has no such powers; the prosecution of civil cases is purely an executive function.[34]

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[34] *Buckley*, 424 U.S. at 138; *Nixon*, 418 U.S. at 693 ("[T]he Executive Branch has exclusive authority and absolute discretion to

The only reasons that have been offered for the *qui tam* provisions of the False Claims Act are that Congress does not fully approve of the way the Executive Branch has exercised its authority to prosecute cases under the False Claims Act, and that it would like to allow private plaintiffs to pursue these cases as well.[35] This, however, is an impermissible motive. Congress cannot transfer law enforcement authority from the Executive simply because it does not like the way that authority is being exercised and would prefer to have some other private or public entity exercise it instead.[36]

Because there is no valid reason for diminishing the President's constitutional authority, it is not necessary to determine exactly how serious a diminution is effected by the Act. This is one of those cases where a balancing test is easy to apply because there is literally nothing on one side of the balance.

However, it should be noted that the extent of the impairment here is quite serious, in many ways more intrusive than the impairment considered by the Court in *Morrison v. Olson*. In the first place, the Ethics in Government Act gives the Attorney General the absolute and

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decide whether to prosecute a case. . . ."); *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (enforcing law is executive function).

[35] *See* 131 Cong. Rec. 22,322 (1985) (remarks of Sen. Grassley) (accusing "Government bureaucracy" of being "unwilling to guard against or aggressively punish fraud"); 132 Cong. Rec. 22,339 (1986) (remarks of Rep. Berman) (stating that "the Department of Justice has not done an acceptable job of prosecuting defense contractor fraud").

[36] The argument that the Executive lacks sufficient resources to prosecute false claims cases also does not provide a valid reason for this law. Perhaps such a justification may have had some validity during the national crisis posed by the Civil War, but today Congress could certainly increase the resources of the Justice Department if more attorneys are needed for such cases. If inadequacy of resources were recognized as a valid justification, Congress could always create an insufficiency of resources when it wished to use this excuse for transferring enforcement authority from the Executive.

unreviewable discretion to decide whether to apply for the appointment of an independent counsel.[37] Once selected, the independent counsel is required to follow the policies of the Justice Department.[38] At any time, the independent counsel is subject to removal for cause.[39] This Court found all of these features of the statute relevant to its decision to sustain the constitutionality of the Act. 487 U.S. at 691-93.

In contrast, the Executive Branch has no ability to control the decision of *qui tam* plaintiffs to bring suit, and they are not required to adhere to the policies of the Justice Department. Indeed, relators are free to advocate positions of fact or law that are contrary to the position of the Department.[40] If the Department decides to take over the prosecution of a case, it can partially displace the relator and assume the principal responsibility for prosecuting the case. However, the relator cannot be entirely removed from the case, even for good cause, and the Department has no power to control or remove the relator if it declines to intervene in a case.[41]

It is worth recognizing that these concerns are not merely theoretical but practical. Litigation by relators can establish interpretations of the False Claims Act and other statutes that are binding precedent on the Government. Such litigation can also disrupt the relationship of the Government with its suppliers, including the administration of vital national security programs such as the B-2 Bomber and Advanced Tactical Fighter programs involved in the present case.[42]

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[37] 28 U.S.C. § 592(f). *See Morrison*, 487 U.S. at 695.

[38] 28 U.S.C. § 594(f). *See Morrison*, 487 U.S. at 696.

[39] 28 U.S.C. § 596(a)(1). *See Morrison*, 487 U.S. at 691-92.

[40] *See generally* 13 Opp. Off. Legal Counsel 249.

[41] 31 U.S.C. §§ 3730(c)(2)(C), (c)(3).

[42] There is also the possibility that decisions in *qui tam* lawsuits will be binding upon the Government through the operation of *res judicata*, collateral estoppel, or the Double Jeopardy Clause. *See* Park, *supra* note 3.

4. *Due Process*

The due process issue in this case is whether litigation to impose civil penalties can be brought by a financially-interested prosecutor. We start with the basic proposition that a judge may not have a financial interest in the outcome of a civil or criminal case. The leading case on this point, *Tumey v. Ohio,* 273 U.S. 510 (1927), involved a mayor who acted as a judge for traffic offenses and received a statutory bounty—the court costs paid by convicted defendants—as part of his compensation. This Court has had no problem in finding that such arrangements deny the accused due process of law, even where the financial interest of the decisionmaker is fairly attenuated.[43]

This Court has never had to consider the question, but it has been generally held that contingent-fee arrangements for criminal prosecutors are also improper.[44] Although our system of justice is adversarial in nature, it has been long accepted that government prosecutors have a higher duty than lawyers for ordinary litigants.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and

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[43] *See, e.g., Ward v. Monroeville,* 409 U.S. 57 (1972) (violation of Due Process Clause where revenues from traffic cases went to city budget and did not personally benefit the mayor).

[44] *See* Annot., *Validity of contract by attorney to prosecute or assist in prosecution of criminal case on contingent fee,* 11 A.L.R. 1192 (1921). Apart from contingent fees, other sorts of personal interests in the outcome of cases have been held to disqualify criminal prosecutors. *See, e.g., United States v. Heldt,* 668 F.2d 1238, 1277 (D.C. Cir. 1981) (prosecutor's status as defendant in civil action could give rise to disqualifying conflict), *cert. denied,* 465 U.S. 926 (1982); *Ganger v. Peyton,* 379 F.2d 709, 714 (4th Cir. 1967) (disqualification of prosecutor for representation of defendant's wife in divorce proceeding); *Colorado v. Jimenez,* 528 P.2d 913, 915-16 (Colo. 1974) (concurrent prosecution of defendant and representation of victim's family constituted grounds for disqualification).

> whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). Similarly, in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), this Court exercised its supervisory power to overturn criminal contempt convictions where counsel for a private litigant had been appointed to prosecute opposing parties for violating a court order.[45]

The same considerations also apply to civil enforcement actions brought on behalf of the Government, including *qui tam* suits under the False Claims Act.[46] The Act authorizes the recovery of treble damages, plus a forfeiture of five to ten thousand dollars for each claim submitted. It is often alleged that each invoice, time card or other supporting document is a separate "claim" for purposes of calculating the amount of the forfeiture.[47] This court has recognized that civil penalties imposed under the False Claims Act can be so severe in some cases as to constitute "punishment" for purposes of the Double Jeopardy Clause. *United States v. Halper*, 490

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[45] Justice Blackmun concurred on the ground that the Due Process Clause requires "a disinterested prosecutor with the unique responsibility to serve the public . . . ." 481 U.S. at 815.

[46] *See People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 705 P.2d 347, 218 Cal. Rptr. 24 (1985) (disqualifying contingent-fee lawyer from representing a city government in civil action to abate a nuisance), *cert. denied*, 475 U.S. 1121 (1986). *See also Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47-48 (D.C. Cir. 1992) (obligation of Government lawyer, even in civil case, is to see "that justice shall be done," not simply "to pound an opponent into submission").

[47] *See, e.g., United States v. Bornstein*, 423 U.S. 303, 311-13 (1976) (allegation that each invoice submitted to the Government constitutes a separate claim for purposes of False Claims Act lawsuit).

U.S. 435 (1989).[48] For purposes of the Due Process Clause, bounty-seeking *qui tam* plaintiffs are just as offensive as a bounty-seeking prosecutor.

This Court considered the problem of civil enforcement by a financially-interested government prosecutor in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). The Court rejected the argument that the receipt of fines by an agency caused its administrative prosecutors to have the sort of financial interest that would violate the Due Process Clause. However, the Court strongly indicated that a direct and substantial financial interest by civil prosecutors would constitute such a violation.

> We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. . . . [T]he decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions . . . .

Id. at 249-50.

The lower court misconceived the due process issue in this case by finding that the relator's interest in a financial recovery was fully congruent with the public interest in successfully enforcing the False Claims Act. Pet. App. 33a. The same could be said for the municipality's interest in successfully enforcing its traffic laws in *Tumey v. Ohio* or the public interest in obtaining successful prosecutions by employing contingent-fee criminal prosecutors.

The point is that prosecutors, including those empowered to seek the imposition of civil penalties, should make

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[48] The Court reserved the question of whether the same considerations would apply in a qui tam suit. 490 U.S. at 451 n.11.

their decisions based upon the public interest without the influence of personal financial gain.

II. THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT INVOLVE ISSUES OF WIDESPREAD IMPORTANCE MERITING IMMEDIATE REVIEW.

The constitutional issues raised by the *qui tam* provisions of the False Claims Act require immediate resolution by this Court. Such review will prevent *qui tam* actions from miring the courts, parties, and the Department of Justice in an ever-increasing number of expensive and complex lawsuits. It also may permit Congress to adopt in a timely manner legitimate alternatives to *qui tam* for combatting fraud against the Government. And it will provide the lower courts with definitive guidance on important constitutional questions whose treatment to date has been marked by confusing and often conflicting decisionmaking.

A. Review of the *Qui Tam* Provisions is Necessary to Avoid Further Wasteful Litigation.

The lower courts unquestionably have witnessed explosive growth in the number of *qui tam* actions brought under the statute. Only 20 *qui tam* lawsuits had been brought during the ten-year period leading to the 1986 amendments. In the seven years since those amendments, however, approximately 600 cases have been filed.[49] The number of *qui tam* filings almost doubled in 1987 alone, and the suits have increased at sometimes geometric rates in every subsequent year.[50] Indeed, nearly 120 new *qui*

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[49] Letter from Frank W. Hunger, Assistant Attorney General, Civil Division, Department of Justice, to the Honorable Howell Heflin, Chairman, Subcommittee on Courts and Administrative Practice, Committee on the Judiciary, U.S. Senate 3 (Sept. 2, 1993). *See Hearings on S. 841—The False Claims Act Amendments of 1993, before the Subcommittee on Courts and Administrative Practice, Committee on the Judiciary, U.S. Senate* 1-3 (Sept. 9, 1993).

[50] *See Report on False Claims Act Implementation, Subcommittee on Administrative Law and Government Relations, House Judiciary Committee*, 101st Cong., 1st Sess. 1-A, 6-A (Apr. 4, 1990) (citing

tam actions were filed in 1992.[51]

In the vast majority of the 600 cases that have been filed—including the instant lawsuit—the Department of Justice has refused to intervene, leaving the relator to pursue the litigation alone. The Justice Department's decision not to intervene usually follows an expensive and time-consuming investigation of the relator's claims.[52] The Assistant Attorney General formerly responsible for the investigation and prosecution of *qui tam* lawsuits has complained that many of those cases are "frivolous" and "meritless." [53] Moreover, the cases that have been prosecuted by *qui tam* relators often result in little monetary recovery by the Government, since many relators structure the settlements to avoid sharing what can amount to millions of dollars by characterizing the payments as "attorney's fees," "wrongful termination settlements," or damages for "emotional distress." [54]

Notwithstanding, or perhaps even because of these difficulties, the volume of *qui tam* litigation is likely to expand dramatically. One obvious spur to such an expansion is the enormous amount of money at stake. Several *qui tam* cases have been reported to involve claims for hundreds of millions of dollars,[55] and total claims from

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statistics for Fiscal Years 1987 through 1989); *Report Confirms Success of Whitsleblowers*, The DOJ Alert, Oct. 1992, at 15 (showing statistics for period through 1992).

[51] *Report Confirms Success of Whistleblowers*, The DOJ Alert, October 1992, at 15-16.

[52] Gerson Statement, *supra* note 29, at 19-20.

[53] *Id.* at 19.

[54] *Id.* at 22-23. *See also DOJ Objects to Whistleblower Settlements*, The DOJ Alert, July 1992, at 7-8 (describing cases in which relator manipulated settlement terms to increase share of award at the expense of the Government).

[55] *See Qui Tam Law Has Aided Antifraud Efforts, but Has Drawbacks, Justice Tells Congress*, 53 Fed. Cont. Rep. (BNA) 488 (Apr. 9, 1990) (noting pendency of "$100 million *qui tam* cases"); *see also United States ex rel. Taxpayers Against Fraud v. Singer*

all pending lawsuits may well exceed one billion dollars.[56] Not surprisingly, members of the plaintiff's bar view *qui tam* as having created "unprecedented opportunities for private attorneys" to be "paid handsomely for the job" of acting as "a quasi-public prosecutor of fraud." [57]

The nature of the False Claims Act itself makes an increase in litigation highly probable. By its terms, it is a statute of almost universal application, implicated by almost any Government contract, grant, appropriation, and spending program.

There are many examples of the reach of *qui tam* beyond defense procurement. Since the passage of the 1986 amendments, the Act has been applied to challenge alleged misrepresentations by nuclear power plants to public utility commissions, alleged bid rigging of moving contracts with the Government, alleged violations of the Buy American Act, alleged violations of the Anti-Kickback Act, alleged failures to test products sold to the Government, alleged fraudulent practices under the Foreign Military Sales Act, and even alleged violations of the Davis-Bacon Act.[58] Some commentators predict that *qui tam*

Co., 889 F.2d 1327, 1329 and nn. 7 & 9 (4th Cir. 1989) (claim for alleged $77 million overcharge).

[56] John R. Phillips, *Qui Tam Litigation: A New Forum for Prosecuting False Claims Against the Government*, 14 J. Legal Med. 267 (1993).

[57] *Id.* at 267.

[58] *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407 (E.D.N.Y. 1989) (nuclear power plants); *United States v. Bonanno Org. Crime Family*, 695 F. Supp. 1426 (E.D.N.Y. 1988) (moving contracts); *United States v. Rule Indus.*, 878 F.2d 535 (1st Cir. 1989) (Buy American Act). *See generally* James B. Helmer & Robert C. Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, The 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 Ohio N. L. Rev. 35, 73-74 (1991). The types of defendants targeted in *qui tam* actions also have expanded outside the defense industry, to include even institutions such as Stanford University and the University

suits will be employed to challenge violations of environmental and labor laws, as well as in the areas of scientific testing and employment discrimination.[59]

Nowhere is the impact of future *qui tam* litigation likely to be greater than in the field of health care. Although several actions already have been brought to challenge alleged violations of federal law in the processing of claims for Medicare payments,[60] the plaintiff's bar views federal health care expenditures as an as yet untapped source of future *qui tam* lawsuits.[61] Congress also has promoted the greater use of *qui tam* lawsuits in this area, declaring in recent legislation that it was the "sense of the Senate" that the False Claims Act and its *qui tam* provisions "be used to their full effect in combatting health care fraud against the Government."[62] The substantial additional governmental involvement in the health care industry that is contemplated by the current Administration's health care reform legislation also could provide fertile ground for new suits, insofar as those proposals would

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of Texas. *See United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Center*, 961 F.2d 26 (4th Cir. 1992).

[59] *See* Major John C. Kunich, USAF, *Qui Tam: White Knight or Trojan Horse*, 33 A.F. L. Rev. 31, 47 (1990) (noting possible use of qui tam in challenges to government contractor's noncompliance with environmental laws); Ron Simon, "Fraud in Government Contracting," in *The Lawyer's Brief* 13 (Dec. 31, 1990) (noting possible expansion of qui tam into areas of labor law, scientific testing, and employment discrimination).

[60] *United States ex rel. Stinson v. Prudential Ins. Co. of Am.*, 736 F. Supp. 614 (D.N.J. 1990), *aff'd*, 944 F.2d 1149 (3d Cir. 1991); *United States ex rel. Stinson v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247 (S.D. Fla. 1989). One commentator has predicated that future *qui tam* suits will move from challenges based on claim-handling procedures to ones premised on the poor quality of medical services provided under federal programs. David C. Hsia, *Application of Qui Tam to the Quality of Health Care*, 14 J. Legal Med. 301, 317 (1993).

[61] Phillips, *supra* note 56, at 272-73.

[62] S. 2652, 103d Cong., 1st Sess. § 8 (Oct. 3, 1992) ("Health Care Fraud Prosecution Act of 1992").

vastly increase the number of transactions subject to potential False Claims Act liability.[63]

Pending amendments to the False Claims Act also would broaden the availability of *qui tam* actions, both by clarifying the ability of federal employees to act as relators and by codifying the retroactive effect of the 1986 amendments.[64] Congress also has considered expanding *qui tam* to other areas. One Senator recently observed:

> *Qui tam* is not limited to fraud in public contracting. It can be used in whatever circumstances Congress deems appropriate. . . . The only boundary to its use is congressional imagination.[65]

These facts all point to the need for review of the constitutionality of *qui tam*. If, as petitioner contends, this device is unconstitutional, the failure to decide that issue now will result in the unnecessary expenditure of time and money by the lower courts, Congress, and defendants.

B. Review Is Necessary to Permit Congress to Adopt a Timely Remedy for the Unconstitutionality of the *Qui Tam* Device.

Prompt review of this question would have the added benefit of permitting Congress to consider alternative measures for fighting fraud against the Government. Unless and until such review occurs, Congress will persist in its use of *qui tam* to the exclusion of other, legitimate means of achieving its legislative objectives.

Alternative methods do exist. At a minimum, more funds could be appropriated for Justice Department attorneys to pursue civil fraud cases. At the same time, a monetary reward system could be established as an in-

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[63] *See* Peter H. Stone, *A Golden Whistle Beckons Law Firms*, Nat'l J., Sept. 25, 1993, at 2319.

[64] H.R. 2915, 103d Cong., 1st Sess. (1993); S. 841, 103d Cong., 1st Sess. (1993).

[65] 139 Cong. Rec. S875 (daily ed. Jan. 28, 1993) (remarks of Sen. Grassley).

centive for individuals to come forward with information that could serve as the basis for cases to be prosecuted by the Government.[66] This system would accomplish the same goals as the *qui tam* provisions of the False Claims Act without suffering from constitutional infirmity.

It is highly unlikely that Congress will pursue these alternatives in the absence of a finding by this Court that the *qui tam* provisions of the False Claims Act are unconstitutional. Even the former Attorney General's expressed concern for the constitutional infirmities of *qui tam* has failed to dampen the ardor of Congressional enthusiasts for continued and expanded use of such suits.[67] This unquestioning reliance on *qui tam* forecloses the consideration of equally effective and more appropriate measures for combatting fraud.

III. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DETERMINE THE CONSTITUTIONALITY OF THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT.

This lawsuit presents the paradigm of the constitutionally-suspect *qui tam* action. The Government has played no part in the prosecution of this matter, having refused to intervene after completing a 40-month investigation of the relator's charges. Only the private plaintiff is pursuing this litigation. Consequently, the posture of this case presents the constitutional issues in their sharpest focus.

That the case was decided by the court below on an interlocutory appeal does not blur the picture. This Court has on any number of occasions granted certiorari

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[66] This type of reward system ultimately was adopted as an alternative to *qui tam* in the 1990 legislation aimed at combatting fraud in the savings and loan industry. 136 Cong. Rec. S9486 (daily ed. July 11, 1990) (remarks of Sen. Roth) (discussing bounty system proposed in Simon-Roth-Dixon amendment).

[67] *See* 139 Cong. Rec. S875-76 (daily ed. Jan. 28, 1993) (remarks of Sen. Grassley) (dismissing concerns raised by former Attorney General Barr and describing constitutional challenges to qui tam as "preposterous").

notwithstanding the lack of finality of the judgment for review was sought. *See, e.g., Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Larson v. Domestic & Foreign Comerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

The constitutional issues raised by this petition involve critical questions regarding the plaintiff's capacity to sue, the jurisdiction of the courts to entertain the suit, and the defendant's burden of having to defend the suit. All of these issues are entirely independent of the merits of the plaintiff's allegations. Their resolution is fundamental not only to the further progress of this litigation, but to the hundreds of *qui tam* suits pending or likely to be filed in the near future. Under these circumstances, there is no reason for the Court to insist upon a full trial record before undertaking to resolve those issues.

There is also no reason to postpone review to permit further "percolation" of the issues concerning the constitutionality of *qui tam*. The arguments have been developed and refined through extensive litigation and commentary.[68] Thus, it is unlikely that additional consideration of these issues by the lower courts will produce enough new insight—if indeed it produces any—to outweigh the harm that would result from delaying resolution.

Finally, it may be some years before a fully-litigated case can reach this Court. The vast majority of *qui tam* suits in which the Government elects not to intervene typically never get to trial, thus mooting the constitutional issues.[69] One reason, if not the primary reason, for this result is the immense pressure imposed upon a defendant to settle even an unmeritorious *qui tam* suit, although such settlements often occur only after the expenditure of substantial efforts by the judiciary, the parties, and the

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[68] *See* cases cited, *supra* note 4, and articles cited, *supra* note 3.

[69] *See* Gerson Statement, *supra* note 29, at 22-23.

Justice Department. The present case thus provides the Court with what has been, and will continue to be, a rare opportunity to provide a definitive ruling on these issues. If this Court does not avail itself of this opportunity, the district courts and litigants will continue to expend valuable resources engaged in a debate that should be resolved now.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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